



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

H.C.C.R NO. 1 OF 2012

REPUBLIC.....PROSECUTION

VERSUS

1. ALIA ADEN HURRE.....1ST ACCUSED

2. FARAH ADOW GALTHI.....2ND ACCUSED

3. HASSAN ABDI ADEN.....3RD ACCUSED

R U L I N G

1. The three accused persons are charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap.63) of the Laws of Kenya. The particulars of the offence are that on 26th day of December, 2011 at Burati area in Isiolo Country, the three accused jointly with others not before court murdered FRANCIS LOPUTUTOP.
2. The accused persons pleaded not guilty to the charge and the matter proceeded to full hearing. The prosecution called ten (10) witnesses in support of the charge against the three named persons.
3. The prosecution case was conducted by Miss Muriithi learned State Counsel while the defence was conducted by Miss Nelima learned Advocate for the three accused persons. That on the conclusion of the prosecution case Miss Nelima learned Advocate submitted that the prosecution had not established a prima facie case to warrant the three accused persons being put on their defence.
4. The learned defence Counsel Miss Nelima urged that four prosecution witnesses PW1, PW3, PW7 and PW8 who were at the scene of incident were not able to positively identify the assailants as the three accused persons.
5. That PW1 allegedly identified the 3rd accused person as the one who fired the shot that killed the deceased, however she submitted his statement to police and his sworn statement to court had discrepancies and admitted on being shown his statement in court the person he described in his statement to police was not amongst the three accused persons. Miss Nelima learned Counsel further submitted that PW1 at the time he made the report to the police he was unable to give the

- description of the assailants and she submitted that was fatal omission in which a witness fails to give the description of the assailant. She submitted that the evidence of PW1 was doubtful and incredible.
6. On identification parade on exhibit P4 on the last page the learned advocate submitted that there are no remarks on the position of the 3rd accused in the parade. The counsel urged that the 3rd accused was not identified. On evidence of PW10 the counsel submitted that identification was conducted for two suspects. The name of the 3rd accused she urged did not appear in the statement of the officer conducting identification parade and as such there could be no remarks on the last page of prosecution exhibit P4.
 7. Miss Nelima learned Advocate on 1st and 2nd accused she submitted that the prosecution was not able to positively identify the two. She referred to prosecution exhibit P2 and P3 pointing out that the names of the two suspects are not those of the accused persons and that they differed from the names in the charge sheet. In exhibit P2 she pointed out that the suspect is ALI ADAN HURRE while in the charge sheet the accused is ALI ADEN HURRE. PW10 in his evidence gave the name of the 1st accused as ALI ADEN NOOR and for the 2nd accused in exhibit P3 as FARAH ADHOW MOHAMMED while the name in the charge sheet is FARAH ADOW GALTHI. The learned Advocate further urged the officer conducting the parade did not follow the Force standing orders in conducting the parade in that the names of the accused were not amongst those who took part in the identification parade contrary to Rule 6(d) of the identification parades which requires a suspect or accused to be placed amongst members of the parade.
 8. Miss Nelima urged that the other prosecution witnesses did give description of the accused persons to the police after the incident. That PW6 the arresting Officer stated that the 3rd accused was the only suspect handed over to him on 30th December, 2011 on a different offence of house breaking and stealing. That no evidence was adduced on how 2nd and 3rd accused were arrested. The counsel added PW6, PW7 and PW8 were not able to identify any of the suspects. The counsel concluded by submitting that the prosecution case was riddled with inconsistencies and loopholes and putting the accused on their defence is like seeking them to fill the prosecution case loopholes. She prayed that the court do uphold her submissions that the accused have no case to answer.
 9. Miss Murithi the learned State Counsel urged that the prosecution has established a prima facie case against all the accused persons. That out of ten (10) prosecution witnesses PW1, PW3 and PW6 were able to identify the accused persons positively through different identification parades which identification the learned State Counsel submitted put the accused persons at the scene of crime.
 10. Miss Murithi learned State Counsel further urged that the deceased was shot 4 times and left to die at the scene of the crime. She submitted the assailants had intention to cause the deceased death.
 11. The learned State Counsel submitted that PW3 testified that he saw the 3rd accused holding AK 47 Rifle and clearly heard the gunshot and added that the prosecution case is unshaken and urged the court to put the accused on their defence.
 12. I have carefully considered the charge with which the accused are charged with, I have equally considered the evidence and submission by both Counsel and that issue for consideration is whether there is evidence that the accused or any one of the three accused committed the offence of murder as charged.
 13. From the evidence of the prosecution witnesses none of them knew the assailants before and none of them gave the description of the assailants to the AP's camp at KMC Isiolo, or Isiolo Police Station before the arrest of the three accused persons. PW1 took part in the identification of the suspects after their arrest and was purportedly able to identify some of the suspects in the

identification parade. He purportedly identified the 3rd accused. However, he admitted that he did not give description of the suspects to Isiolo Police officers. On being referred to his statement to police he agreed he had described the he saw as tall, black and aged about 50 years. He admitted the person he saw is not amongst the three accused persons. PW2 in his evidence stated that he did not receive the description of the assailants. The driver and his passengers went to report of the incident of the attack to Isiolo Police Station. PW3 was part of the team which reported the attack to PW2. He took part in the identification parade and identified three suspects. He stated he was able to identify the three accused through their physical appearance however, on being referred to his statement to police he agreed he did not give any physical appearances of the suspects. He admitted that he did not give description of the assailants when he reported at the AP's Camp and at Isiolo Police station.

14. PW4 did not identify any of the assailants. PW5 evidence was of rearresting of the 3rd accused who was arrested with an offence of housebreaking and stealing by members of public. He organized for the 3rd accused to take part in identification part. The 3rd accused took part in identification parade and was identified. PW5 recommended that the 3rd accused to be released as at the time of commission of the offence he was in police cells however, as he was identified the police decided to charge him with this offence. He admitted that in his statement there was no mention of the 3rd accused taking part in the identification parade. The other prosecution witness PW6, PW7, and PW9 did not identify any of the assailants.

15. Having carefully considered the evidence of witnesses at the scene of the incident, PW1, PW3, PW4, PW6, PW7, and PW8 it is interesting to note though the incident took place during day time at noon, none of them was able to identify the assailants. That none of them gave the description of the assailants to the police in their first report. PW3 attempt to connect 3rd accused with this offence by purporting to identify the 3rd accused is not believable as in his evidence in chief he stated the person he identified was not amongst the accused persons. Similarly PW1 at the time of making his report to the police he was unable to give the description of the assailants. The prosecution witnesses failure to give description of the assailants at their first report is fatal to the prosecution case. Their evidence is not credible and indeed this court doubt it.

16. On identification parade the Investigation Officer PW10 testified the same was conducted by Inspector Batian for the three accused persons. He testified according to Inspector Batian there was no identification parade carried out for the 3rd accused. He referred to Exhibit P2, exhibit P3, and exhibit P4 and confirmed the identification parade were for other people other than the three accused persons as the names of suspect on exhibit P2 is for Ali Adan Nure whereas the first accused is Ali Aden Hurre; exhibit P3 is for Farah Adhow Mohammed whereas the 2nd accused is Farah Adow Galthi and exhibit P4 is for Hassan Abdi whereas the 3rd accused is Hassan Abdi Aden. No explanation was given on the difference of the names and whether the accused were also known by such names as well. This failure casts doubts as to whether the accused person took part in the identification parade.

17. Further the prosecution witness stated the suspects were not amongst the members of the parade. Exhibit P2, P3 and P4 clearly shows the names of the three suspects were missing. How then were the prosecution witnesses able to identify the three accused when they did not take part in the identification parade? The purported identification parades were in complete breach of the Force Standing Orders. The identification parade was marred with irregularities. It was a sham and a violation of the suspect's Constitutional rights by condemning them in their absence. I find therefore that was not proper identification parades and the same are rejected as they are worthless piece of paper which if accepted and used in this serious case would amount to miscarriage of justice and would be against Article 50 of the Constitution which deals with fair trial.

18. It is of great interest to note that PW10 testified that they were given descriptions of the accused persons by members of public who were not called as witnesses. I find if such evidence would be allowed would send many innocent people to jail. The prosecution if it had such witnesses the

same should have been called to give evidence and be subjected to cross-examination to test the truth of that evidence. I believe there were no such witnesses and if they were they were not disclosed and called as their evidence would have been unfavorable to the prosecution case.

19. Having considered the prosecution case and evidence from the ten (10) prosecution witnesses I find that the assailants of the deceased herein were not identified, the evidence before this court is riddled with inconsistencies and contradictions that the identification parades were not properly conducted and is of no evidential value. The upshot is that the prosecution have failed to establish a prima facie case against all the three accused persons. The three accused persons are acquitted on no case to answer under Section 306 of the Criminal Procedure Code and set at liberty forthwith unless otherwise held.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF OCTOBER, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Miss Murithi for the State
2. Miss Nelima for the accused.

All three accused present

J. A. MAKAU

JUDGE